

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEPHEN R. ASMUSSEN and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, San Jose, CA

*Docket No. 00-1150; Submitted on the Record;
Issued August 14, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

The Board has duly reviewed the case record and finds that the Office did not abuse its discretion in refusing to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

On July 11, 1997 appellant, then a 41-year-old tax attorney, filed a claim for an occupational disease assigned number 13-1141418 alleging that he experienced an aggravation of dysthymia and anxiety resulting in major depression and elevated anxiety levels, including related complications due to factors of his federal employment.¹

By decision dated September 15, 1998, the Office found the evidence of record insufficient to establish that appellant sustained an emotional condition in the performance of duty after he returned to work on December 5, 1995. In a September 14, 1999 letter, appellant requested reconsideration of the Office's decision.

In a December 2, 1999 decision, the Office denied appellant's request for a merit review of his claim.

The only decision before the Board on this appeal is the Office's December 2, 1999 decision denying appellant's request for a review of the merits of its September 15, 1998 decision. Because more than one year has elapsed between the issuance of the Office's

¹ On the same date as the instant claim, appellant filed an occupational disease claim assigned number 13-1141360 alleging that he sustained an emotional condition due to factors of his federal employment. By letter dated September 2, 1998, the Office accepted appellant's claim for aggravation of preexisting recurrent major depression for the period July 24 through December 3, 1995.

September 15, 1998 decision and March 1, 2000, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the September 15, 1998 Office decision.²

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,³ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.⁴ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁵ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁶

On reconsideration, appellant alleged that his emotional condition was caused by an unacceptable performance appraisal he received after he returned to work on December 5, 1995. Appellant previously made this argument and it was considered by the Office in its September 15, 1998 decision denying his claim for an occupational disease. The Board has held that the submission of evidence, which repeats or duplicates evidence already in the case record, does not constitute a basis for reopening a case.⁷

Appellant also alleged that it was improper for Peter Hochman, appellant's supervisor, to share confidential information about his medical treatment with Julie Wisbar, appellant's coworker. Appellant submitted Ms. Wisbar's August 18, 1995 affidavit, which he stated was discovered during the course of an Equal Employment Opportunity Commission investigation, in support of his allegation. Ms. Wisbar stated that Mr. Hochman told her appellant had a nervous breakdown last year and that he had to take some time off from work. Ms. Wisbar further stated that she was not sure if Mr. Hochman used the words "nervous breakdown," in describing appellant's condition, but that was how she interpreted them. She also stated that after she expressed her concern about appellant's condition, Mr. Hochman told her appellant was seeing a doctor for some problems that were not physical. Although Ms. Wisbar's affidavit had not been previously submitted, it does not contain any information relevant to appellant's allegations regarding his claimed factors of employment that were considered by the Office in its September 15, 1998 decision. Appellant did not allege that the sharing of confidential information by Mr. Hochman was a cause of his emotional condition prior to the Office's September 15, 1998 decision. Thus, Ms. Wisbar's affidavit does not demonstrate that the Office's decision was erroneous.

² See 20 C.F.R. § 501.3(d)(2).

³ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(1)-(2).

⁵ *Id.* at § 10.607(a).

⁶ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁷ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

Accordingly, the Board finds that appellant did not raise any substantive legal questions, and failed to submit any new relevant and pertinent evidence not previously reviewed by the Office. Thus, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

The December 2, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
August 14, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member